

US Serial No. 10/506251
Page 6 of 11

Remarks:

Regarding the rejection of claims 1-8, 12, 13, 15, 16, 17, 20, 21 and 21 under 35 USC 103(a) as being obvious in view of by XP-002249876 to Schieberle (hereinafter simply "Schieberle") or WO 03/041515 to Berchtold (hereinafter simply "Berchtold"):

The applicant traverses the Examiner's rejection of the foregoing claims in view of Schieberle reference or alternately, in view of the Berchtold reference.

With regards first to the Schieberle reference, Applicant respectfully disagrees with the Examiner's assertions. It is impossible to know if 2-FFT will be formed before trying it out, and likewise it is not possible to predict whether the resulting treated seeds will have flavor modifying properties/enhanced overall flavor impact as well. Nothing in Schieberle points to even the potential utility of any other seeds than the ones described by Schieberle; Brassica seeds are not disclosed or mentioned by Schieberle. Schieberle is solely directed to sesame seeds which are of a different family, genus and species. As is known in the art, sesame (*Sesamum indicum*) is a flowering plant in the genus *Sesamum* of the family *Pedaliaceae*, order *Lamiales*. Schieberle does not disclose any process for the treatment of seeds from the genus *Brassica*. There is no basis in scientific fact whereby a skilled artisan considering the Schieberle reference would have any reasonable expectation to produce the applicant's currently claimed invention from sesame seeds. From Schieberle's teachings limited to sesame seeds, there is no reasonable basis that a skilled artisan would expect *Brassica* seeds to form 2-furfurylthiol upon heating, nor that the heat-treated seeds would be useful as flavour modifier/enhancer which results in a higher overall flavor impact. Neither 2-furfurylthiol nor *Brassica* seeds which are heat-treated as claimed were known to have these properties. Certainly Schieberle, whose limited focus is on sesame seeds, disclose or suggest any such properties in *Brassica* seeds, as Schieberle's inquiry is strictly restricted to the discovery of various flavour compounds in roasted sesame seeds, and in particular the identification of the main sesame aroma compounds. Additionally it is quite clear from Schieberle's comments that the prediction of 2-furfurylthiol formation is far from clear (compare page 151 left

US Serial No. 10/605251
Page 7 of 11

column, immediately prior to the last paragraph). This is hardly a surprise, as each material (and each seed, even seed variants) are different extremely complex mixtures, and reactions occurring upon heating are impossible to predict.

Accordingly, it is the applicant's position that the Schieberle reference fails to suggest the subject matter of the current claims, and that the Examiner's rejection should be withdrawn. Rather the applicant asserts that the respective technical field is highly unpredictable.

The "predictability or lack thereof" in the art refers to the ability of one skilled in the art to extrapolate the disclosed or known results to the claimed invention. If one skilled in the art can readily anticipate the effect of a change within the subject matter to which the claimed invention pertains, then there is predictability in the art. On the other hand, if one skilled in the art cannot readily anticipate the effect of a change within the subject matter to which that claimed invention pertains, then there is lack of predictability in the art. Accordingly, what is known in the art provides evidence as to the question of predictability. In particular, the court in *In re Marzocchi*, 439 F.2d 220, 223-24, 169 USPQ 367, 368-70 (CCPA 1971), stated:

"[i]n the field of chemistry generally, there may be times when the well-known unpredictability of chemical reactions will alone be enough to create a reasonable doubt as to the accuracy of a particular broad statement put forward as enabling support for a claim. This will especially be the case where the statement is, on its face, contrary to generally accepted scientific principles. Most often, additional factors, such as the teachings in pertinent references, will be available to substantiate any doubts that the asserted scope of objective enablement is in fact commensurate with the scope of protection sought and to support any demands based thereon for proof."

As the applicant has noted, the Examiner's continued reliance on the Schieberle reference is unsupported and untenable as being distinguishable over the applicants presently claimed invention.

US Serial No. 10/505251
Page 8 of 11

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Accordingly, it is the applicant's position that the Schieberle reference fails to teach, and hence fails to anticipate, the subject matter of the current claims, and that the Examiner's rejection should be withdrawn.

Turning now to Berchtold and in consideration of the newly amended claims presented in this paper, Berchthold uses *Brassica* seeds but uses a maximum temperature which is no longer proximate to the currently claimed minimum temperature claimed by the present applicant. Bertchold also fails to teach the applicant's preferred temperature range of between 160°C to about 250°C.

Notably, Berchthold does not disclose treating brassica seeds at a temperature of up to 210°C, contrary to Examiner's assertion, since the higher temperature in Berchthold applies to leguminosae only, which again are different plants. For seeds of the genus *Brassica*, according to Berchthold, the lower temperature of up to 120°C applies, which is a maximum temperature applicable to *Brassica* seeds, although lower temperatures may be practiced. Thus, a skilled artisan, cognizant of the complex nature of the individual constituents present would likely not even use a temperature which is proximate to the 120°C temperature, but would likely utilized a temperature lower than 120°C so as not to degrade the product. Surprisingly the applicant's currently claimed temperatures are in excess of 120°C. Thus it is clear that Berchthold which both fails to suggest the applicant's presently claimed temperature range and concurrently "teaches away" teaching away from using higher temperatures in excess of 120°C.

Accordingly, it is the applicant's position that the Berchtold reference fails to teach, and hence fails to anticipate, the subject matter of the current claims, and that the Examiner's rejection should be withdrawn.

Regarding the rejection of claims 1-7, 12, 15, 16, 20, 21 and 22 under 35 USC 102(b) in view of XP009014888 to Vasundhara et al. (hereinafter simply "Vasundhara"):

US Serial No. 10/505251
Page 9 of 11

The applicant respectfully traverses the rejection of the foregoing claims in view of the Vasundhara reference. Reference is made to the newly amended claims presented in this paper.

First, with respect to the currently claimed temperatures, Vasundhara does not disclose these temperatures as presently claimed and thus Vasundhara cannot be considered as anticipating the currently claimed invention. Further, a review of Vasundhara reveals that it also fails to disclose 2-furfurylthiol. Thus there is no basis for supporting the contention that Vansundhara provides *any teaching or suggestion* whatsoever which correlates the presence of 2-furfurylthiol with any flavor enhancing or flavor modifying properties.

Accordingly, it is the applicant's position that the Vasundhara reference fails to teach, and hence fails to anticipate, the subject matter of the current claims, and that the Examiner's rejection should be withdrawn.

Regarding the rejection of claims 9-11, 16, 18-19 under 35 USC 103(a) as being anticipated by WO 98/95220 to Ott (hereinafter simply "Ott"):

The applicant traverses the Examiner's rejection of the foregoing claims in view of the Ott reference.

A skilled artisan reviewing this prior art document would note that Ott discloses the use of 1-nonen-3-one as flavouring agent, and also notes flavor compositions with 1-nonen-3-one and one or more of a plethora of various other flavor compounds, including 2-furfurylthiol. However with reference now to the currently amended claims presented in this paper, Ott does not disclose any consumables comprising *Brassica* seeds treated according to the process delineated in claim 1. Further, Ott provides no reasonable basis for a skilled artisan to differentiate among the plethora of various other flavor compounds and isolate 2-furfurylthiol to suggest that its presence in a composition which would have

US Serial No. 10/505251
Page 10 of 11

any flavor enhancing or flavor modifying properties. The Ott document provides no such basis for such a conclusion. Any other conclusion would necessarily be the result of a 'hindsight reconstruction' of the applicant's currently claimed invention, which is impermissible. The Examiner is reminded that in *In re Fritch*, 972 F.2d 1260, 1266, 23 USPQ2d 1780, 1784 (Fed. Cir. 1992), the Federal Circuit stated:

"It is impermissible to use the claimed invention as an instruction manual or "template" to piece together the teachings of the prior art so that the claimed invention is rendered obvious. *In re Gorman*, 933 F.2d 982, 987, 18 USPQ2d 1885, 1888 (Fed. Cir. 1991). This court has previously stated that "[o]ne cannot use hindsight reconstruction to pick and choose among isolated disclosures in the prior art to deprecate the claimed invention." (quoting *In re Fine*, 837 F.2d at 1075, 5 USPQ2d at 1600)

See also *W.L. Gore & Associates, Inc. v. Garlock, Inc.* 220 USPQ 303 (CAFC, 1983); *In re Mercier* 185 USPQ 774, 778 (CCPA, 1975); *In re Geiger* 2 USPQ2d 1276 (CAFC, 1987); *In re Rouffet*, 47 USPQ2D 1453 (Fed. Cir. 1998)

Accordingly, it is the applicant's position that the Ott reference fails to teach, and hence fails to anticipate, the subject matter of the current claims, and that the Examiner's rejection should be withdrawn.

In view of the foregoing, reconsideration of the propriety of the outstanding rejection of all of the claims is requested.

CONDITIONAL AUTHORIZATION FOR FEES

Should any further fee be required by the Commissioner in order to permit the timely entry of this paper, the Commissioner is authorized to charge any such fee to Deposit Account No. 14-1263.

US Serial No. 10/505251
Page 11 of 11

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PETITION FOR A TWO-MONTH EXTENSION OF TIME

The applicants respectfully petition for a two-month extension of time in order to permit for the timely entry of this response. The Commissioner is hereby authorized to charge the fee to Deposit Account No. 14-1263 with respect to this petition.

Respectfully Submitted;

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28 July 2008
Date:

CERTIFICATION OF TELEFAX TRANSMISSION:

I hereby certify that this paper and any indicated enclosures thereo is being telefax transmitted to the US Patent and Trademark Office to telefax number: 571-273-8300 on the date shown below:

Parfomak
Andrew N. Parfomak

28 July 2008
Date

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